IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

REPLY IN SUPPORT OF DEFENDANTS' JOINT MOTION TO STRIKE JURY DEMAND (Dkt. No. 2388)

Defendants' Joint Motion to Strike Jury Demand, Dkt. No. 2388 (Aug. 3, 2009) ("Motion"), requested the Court to strike the jury demand in Plaintiffs' Second Amended Complaint ("SAC") under Fed. R. Civ. P. 38 because none of the remaining issues in this case are matters to be tried to the jury. Plaintiffs have conceded, as they must, that no jury issues exist with respect to the remaining common law claims for injunctive relief (Counts 4, 5 and 6) or their RCRA claim (Count 3). *See Plaintiffs' Response in Opposition to Defendants' Joint Motion to Strike Jury Demand*, Dkt. No. 2444 at 2 (Aug. 10, 2009) ("Opposition" or "Opp.").[1] The only possible remaining basis for Plaintiffs' jury demand are requested civil penalties under Counts 7 and 8. To the extent civil penalties are even available for these state statutory claims—and they are not—the requested remedy constitutes a form of equitable relief for which the right to a jury trial does not attach. *See* Motion at 6-12.[2]

I. Plaintiffs' Claims for Civil Penalties in Counts 7 and 8 Do Not Require a Jury Trial

Plaintiffs' reliance on the "civil penalty" provisions cited in Counts 7 and 8 as the sole remaining basis for their jury demand is flawed in several respects. *First*, the requested civil penalties are equitable in nature, and therefore properly subject to a bench trial in accordance with the Supreme Court's jurisprudence. *Second*, civil penalties are not available to Plaintiffs under Counts 7 and 8. Neither 2 Okla. Stat. § 2-18.1 (Count 7) nor the Oklahoma Registered Poultry Feeding Operations Act ("RPFO Act") (Count 8) authorize recovery of civil penalties. Further, Plaintiffs cannot recover such penalties under any of the statutes at issue because they

[1] Likewise, Plaintiffs do not dispute that conducting a bench trial will conserve substantial resources for the parties, the Court and the potential jurors. *See generally id.*; Motion at 10-11.

[2] Alternatively, Plaintiffs request that the Court delay striking the jury demand in light of their pending motion for reconsideration of the Court's dismissal of Count 2. *See* Opp. at 10-11; *see also Plaintiffs' Motion for Reconsideration of the Court's July 22, 2009 Opinion and Order*, Dkt. No. 2392 (Aug. 3, 2009) ("motion for reconsideration"). Even if there were any basis for reconsideration, that motion is irrelevant because the recovery of CERCLA natural resource damages is a form of equitable restitution that does not confer the right to a jury trial.

have failed to satisfy their burden to identify evidence of the specific violations in question.[3]

A. Plaintiffs' Claims for Civil Penalties Constitute a Form of Equitable Relief that Is Not Subject to a Jury Trial

Whether the nature of the relief sought under Counts 7 and 8 is legal or equitable in nature is a question of first impression. *See* Motion at 7.[4] The resolution of that issue depends on: (*i*) whether the legislature indicated an intent that money damages made available by statute are equitable; (*ii*) whether the monetary remedy is restitutionary in nature; or (*iii*) whether the "monetary award [is] 'incidental to or intertwined with injunctive relief." *Chauffeurs*, 494 U.S. at 570-72 (citing *Tull*, 481 U.S. at 424); *see* Motion at 6-7. Each of these factors indicates that Plaintiffs' claim for civil penalties under Counts 7 and 8 constitutes a form of equitable relief, and as such, does not confer the right to a jury trial.

Plaintiffs concede that, in state court, the statutory provisions in question do not confer the right to a jury trial. *See* Opp. at 4; *see, e.g.*, 27A Okla. Stat. § 2-3-504(F)(2) ("The *court* shall have jurisdiction to determine said action, and to grant the necessary or appropriate relief…."). Although Plaintiffs are correct that this result is not dispositive in federal court, *see* Opp. at 4, it nonetheless is integral to this Court's analysis under the Seventh Amendment because it is indicative of the Oklahoma Legislature's intent to provide a form of equitable (not legal) relief.

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[3] Additionally, Defendants have requested judgment on Counts 7 and 8 pursuant to the arguments set forth in *Defendants' Joint Motion for Summary Judgment on Counts 7 & 8*, Dkt. No. 2057 (May 18, 2009).

[4] Plaintiffs erroneously state that "the Supreme Court has already definitively addressed this question" in *Tull v. United States*, 481 U.S. 412 (1987). Opp. at 5. In *Tull*, the Court defined the nature of civil penalties available under the Clean Water Act ("CWA"), but undertook no analysis of the Oklahoma state statutory provisions at issue here. *See Tull*, 481 U.S. at 420-25. The fact that the state statutes use the terminology of "civil penalties," is not in and of itself definitive. *See, e.g.*, *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570-71 (1990) ("This Court has not … held that any award of monetary relief must *necessarily* be legal relief.") (emphasis in original) (internal quotations omitted). To the contrary, a court should undertake an independent analysis of each statutory provision to determine whether the potential monetary award is equitable in nature. *See id.*

See Chauffeurs, 494 U.S. at 572 (noting that awards under Title VII may be equitable because Congress indicated that intent). Given that the right to a jury trial is protected under the Oklahoma constitution, the legislative mandate that the court, not the jury, "shall have jurisdiction to determine said action" indicates an intention to provide an equitable remedy that does not confer a right to jury trial. 27A Okla. Stat. § 2-3-504(F)(2).

Unlike the CWA penalty provisions analyzed in *Tull*, the imposition of civil penalties under the Oklahoma statutes in question are not intended to punish,[5] but rather to disgorge any economic benefit retained as a result of the alleged violation. *See* Motion at 8-9; *see*, *e.g.*, 27A Okla. Stat. § 2-3-504(H) ("In determining the amount of a civil penalty the court shall consider such factors as … the economic benefit, if any, resulting to the defendant from the violation [and] … the economic impact of the penalty on the defendant [among others]."). The considerations listed in 27A Okla. Stat. § 2-3-504(H) demonstrate that the penalties imposed are restitutionary in nature, and as such, constitute a form of equitable relief. *See Chauffeurs*, 494 U.S. at 570-71 ("[W]e have characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'") (quoting *Tull*, 481 U.S. at 424).

Finally, the award requested by Plaintiffs in this case is clearly "incidental to [and] inter-twined with injunctive relief." *Chauffeurs*, 494 U.S. at 571; *see* Motion at 7. In *Tull*, the "Government was aware when it filed suit that relief would be limited primarily to civil penalties, since petitioner had already sold most of the properties at issue." *Tull*, 481 U.S. at 425. By contrast, the relief sought by Plaintiffs here focuses primarily (if not solely) on an order enjoining future land application of poultry litter in the IRW and the remediation of past

[5] Plaintiffs' interpretation to the contrary is based on the singular use of the term "punish" in the text. *See* Opp. at 5. Tellingly, neither this term nor any related consideration is listed as a factor for the court to consider in determining the amount of a civil penalty to be imposed. *See* 27A Okla. Stat. § 2-3-504(H).

pollution. *See* Motion at 7. In fact, despite nearly five years of litigation, Plaintiffs have not identified a single specific violation of these state statutes for which they seek a penalty, nor have they attempted to quantify the civil penalties being sought. *See, e.g.*, Dkt. No. 2254 Exs. 35-37 at Nos. 5-8 (June 19, 2009). In sum, even if the Court eventually were to impose some civil penalty, that penalty would be remedial in nature, ancillary to and inter-twined with Plaintiffs' request for injunctive relief.

B. Civil Penalties are not Available under 2 Okla. Stat. § 2-16 (Count 7) or the RPFO Act (Count 8)

Civil penalties are not available for the alleged violations of 2 Okla. Stat. § 2-18.1 (Count 7) and the RPFO Act (Count 8). *See* Opp. at 7-10. Accordingly, neither statute may constitute the basis for Plaintiffs' jury demand.

1. 2 Okla. Stat. § 2-18.1 (Count 7)

Civil penalties are not an available form of relief for violations of 2 Okla. Stat. § 2-18.1.[6] In fact, the statute—which is entitled "Pollution of air, land, or waters—Order to cease—*Administrative penalty*"—does not contain a single reference to that phrase. *Id.* (emphasis added). As the title and statutory text plainly state, the only available penalty is the "assess[ment of] an administrative penalty pursuant to Section 2-18." 2 Okla. Stat. § 2-18.1(B).[7]

While Plaintiffs concede the absence of a civil penalty provision in 2 Okla. Stat. § 2-18.1, they nevertheless attempt to rely upon the language of 2 Okla. Stat. § 2-16(B) as the basis for their requested relief—the relevant part of which states:

Any action to … recover any administrative or civil penalty or other fine assessed

[6] There is no record of any civil penalty ever having been assessed for a violation of this statute.

[7] Although Plaintiffs contend that "Defendants conflate and confuse 'administrative penalties' with 'civil penalties'" available for violations of Section 2-18.1, Opp. at 7-8 n.5, the distinction between the two types of relief is in fact quite clear. Administrative penalties (which Plaintiffs do not seek) are available for violations of 2 Okla. Stat. § 2-18.1. Civil penalties are not.

> pursuant to the Oklahoma Agricultural Code, may be brought by: … (2) The Attorney General on behalf of the State of Oklahoma….

2 Okla. Stat. § 2-16(B). Contrary to Plaintiffs' proposed interpretation, this statute is not the "remedy provision accompanying 2 Okla. Stat. § 2-18.1," Opp. at 7,[8] nor does it authorize the Attorney General to recover some unidentified amount of "administrative or civil penalty or other fine" for every violation of the Oklahoma Agricultural Code, Opp. at 7-8. Instead, the statute merely confers authority to institute an action to "recover any administrative or civil penalty or other fine" that already has been assessed under the Oklahoma Agricultural Code. *Id*. For example, under this provision, the Attorney General may institute an action to recover any administrative penalties assessed under 2 Okla. Stat. § 2-18,[9] or any civil penalties assessed for violations of the Oklahoma Swine Feeding Operations Act, 2 Okla. Stat. § 20-26.[10] However, the provision does not permit the Attorney General to recover unspecified "penalties" that are not otherwise assessed pursuant to a substantive provision of the Oklahoma Agricultural Code.

2. RPFO Act (Count 8)

Similarly, the RPFO Act's penalty provision does not authorize the recovery of civil penalties. *See* 2 Okla. Stat. § 10-9.11 ("Violations--Criminal and *administrative penalties*—Injunctions") (emphasis added).[11] Instead, as indicated by the title of its penalty provision, the

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[8] In reality, Section 2-16 is not a remedy provision, but rather the statutory basis setting forth the "[d]uties of district attorney or Attorney General" and courts' jurisdictional limits under the Oklahoma Agricultural Code. The remedy provision that actually accompanies 2 Okla. Stat. § 2-18.1 is expressly referenced therein as 2 Okla. Stat. § 2-18. As detailed previously, this remedy provision provides for the recovery of administrative—not civil—penalties.

[9] *See* 2 Okla. Stat. § 2-18(A) ("Board shall have the authority to assess an administrative penalty of not less than One Hundred Dollars ($100.00) and not more than Ten Thousand Dollars ($10,000.00) for each violation.").

[10] *See* 2 Okla. Stat. 20-26(B) ("Any owner or operator who fails to take such action … pursuant to this act … may be punished by … the assessment of a civil penalty up to Ten Thousand Dollars ($10,000.00) for each violation.").

[11] Again, there is no record of any civil penalty having been assessed under the RPFO Act.

RPFO Act provides that the only forms of relief available for violations thereof are: (*i*) "criminal penalties"[12]; (*ii*) "an administrative penalty"[13]; or (*iii*) "injunctive relief"[14].

Plaintiffs concede that the RPFO Act is "silent as to recovery of civil penalties." Opp. at 7. Nevertheless, Plaintiffs argue the statute "clearly contemplates civil penalties being recoverable" based on a singular reference in the statute, which states:

> Except as otherwise provided by law, administrative and civil penalties shall be paid into the State Department of Agriculture Regulation Revolving Fund.

2 Okla. Stat. § 10-9.11(D); Opp. at 9. Plaintiffs' expansive interpretation of this non-dispositive provision lacks any merit, as it is contrary to the plain meaning of the statutory text, the clear intent of the Oklahoma Legislature, and prevailing canons of statutory interpretation.

Where the Oklahoma Legislature seeks to authorize the imposition of civil penalties, it has repeatedly demonstrated its understanding and ability to do so by express terms.[15] In contrast to the SFO and CAFO Acts—both of which expressly provide for the recovery of administrative *and* civil penalties—the Oklahoma Legislature omitted any reference to civil penalties in the list of available remedies under the RPFO Act, and failed to provide any terms

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[12] 2 Okla. Stat. § 10-9.11(A) ("Any person violating the provisions of the Oklahoma [RPFO] Act shall, upon conviction, be guilty of a misdemeanor and may be punished by a fine not to exceed Two Hundred Dollars ($200.00).").

[13] 2 Okla. Stat. § 10-9.11(B)(1)(a) ("the State Department of Agriculture may: (a) assess an administrative penalty of not more than Two Hundred Dollars ($200.00) per day of noncompliance"); *see also id.* at §§ 10-9.11(B)(3), (B)(4), (C)(1), (D) (referencing recovery of "administrative penalty").

[14] 2 Okla. Stat. § 10-9.11(B)(1)(b) ("the State Department of Agriculture may: (b) bring an action for injunctive relief granted by a district court").

[15] *See, e.g.*, 2 Okla. Stat. § 20-26 (authorizing the "the assessment of a civil penalty up to Ten Thousand Dollars ($10,000.00) for each violation" of the Oklahoma Swine Feeding Operations Act ("SFO Act")); 2 Okla. Stat. § 20-62(B) (authorizing the "the assessment of a civil penalty up to Ten Thousand Dollars ($10,000.00) for each violation" of the Oklahoma Concentrated Animal Feeding Operations Act ("CAFO Act")).

for the recovery thereof.[16] Further, a comparison of the statutory language indicates that the inclusion of the phrase "administrative and civil penalties" in 2 Okla. Stat. § 10-9.11(D) was likely the result of a scrivener's error, as evidenced by the Legislature's use of precisely the same language for the "Revolving Fund" provisions of the RPFO, SFO and CAFO Acts. *Compare* 2 Okla. Stat. § 10-9.11(D), *with* 2 Okla. Stat. § 20-26(G), 2 Okla. Stat. § 20-62(G).[17] Where the Oklahoma Legislature has not included civil penalties as an available remedy under the RPFO Act, this Court should not interpret a reference to the term in a non-dispositive clause as creating a substantive right of recovery that does not otherwise exist. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 257-262 (1994) (rejecting argument based upon "the canon that a court should give effect to every provision of a statute" because it was "unlikely that Congress intended the [disputed clause] to carry the critically important meaning petitioner assigns it").

C. Plaintiffs Have Not Identified Record Evidence of Any Statutory Violations Under Counts 7 and 8

As detailed in *Defendants' Joint Motion for Summary Judgment on Counts 7 & 8*, Plaintiffs have yet to identify record evidence of any statutory violation or quantify the amount of any civil penalty to be imposed under Counts 7 and 8. *See* Dkt. No. 2057 at 8-9 ¶¶24-29, 24-25 (May 18, 2009); Dkt. No. 2254 at 10 (June 19, 2009); *see, e.g.*, Fisher I Dep. at 146:22-149:1 (in four years of investigation in the IRW, Plaintiffs' field investigators failed to document any

[16] *See Seneca-Cayuga Tribe of Okla. v. Nat'l Indian Gaming Comm'n*, 327 F.3d 1019, 1034 (10th Cir. 2003) ("[T]he maxim of statutory construction *expressio unius est exclusio alterius* … means inclusion of one thing indicates exclusion of the other. In this context the notion is one of negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced.") (internal quotations omitted); *see also, e.g.*, *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978).

[17] *See United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439, 461 (1993) (statute "should be read" as if written without scrivener's error); *Holloway v. United States*, 526 U.S. 1, 19 n.2 (Scalia, J. dissenting) ("text without [a plausible purpose] may represent a 'scrivener's error' that we may properly correct").

violations of state litter laws) (Dkt. No. 2057 Ex. 12).

Because of their inability to identify any specific violations of these Oklahoma statutes, Plaintiffs assert that each and every application of poultry litter in the Oklahoma portion of the IRW constitutes a violation of the Registered Poultry Feeding Operations Act (RPFO Act) (Count 8) and Oklahoma environmental statutes (Count 7).[18] But, even this expansive (and erroneous) view of the statutes does not save their claims for civil penalties. *First*, Plaintiffs have identified no evidence of the specific instances and responsible parties for "*each* land application of poultry waste in the Oklahoma portion of the IRW." Dkt. No. 2166 at 25; *see* Dkt. No. 2057 at 8-9 ¶¶24-29, 24-25. Absent this evidence, Plaintiffs cannot even begin to meet their burden of proving "each violation" of the statute. *See, e.g.*, 27A Okla. Stat. § 2-3-504.[19] *Second*, by Plaintiffs' own admission, it is not possible to disaggregate their evidence to determine the source of the alleged pollution-causing conduct. *See* Dkt. No. 2182 at 21, 21-22 n.11 (June 5, 2009). As a result, this type of circumstantial evidence cannot be used to impose civil penalties under the statutes in question, because any claim for civil penalties under Oklahoma law must be based *solely* on conduct occurring in Oklahoma (not Arkansas). *See* Dkt. No. 2254 at 10; Dkt. No. 2057 at 11. Because Plaintiffs cannot meet the burden of proof necessary to recover civil penalties under Counts 7 and 8, this form of relief cannot constitute the basis for a jury demand.

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[18] *See* Dkt. No. 2166 at 25 (June 5, 2009) (alleging that their "evidence suffices to make out violations of the RPFO Act as to *each* land application of poultry waste in the Oklahoma portion of the IRW"); *id.* (alleging that "some of this poultry waste *always* runs off from the fields in the Oklahoma portion of the IRW where it has been land applied, [and] … this poultry waste runoff is not only likely to cause pollution of Oklahoma's waters, it is causing pollution of Oklahoma's waters") (emphasis in original); Dkt. No. 2057 at 16-17 n.9.

[19] Plaintiffs' inability to satisfy its burden of proof in this respect is further evidenced by their repeated refusal to quantify the amount of civil penalties they seek to impose upon each individual defendant. *See* Dkt. No. 2254 Exs. 35-37 at Nos. 5-8; Opp. at 3 n.2. In contrast, the alleged violations in *Tull* were supported by clear record evidence of each specific statutory violation, for which "[t]he Government's complaint demanded the imposition of the maximum civil penalty of $22,890,000." *Tull*, 481 U.S. at 415.

II. Plaintiffs' Natural Resource Damages Claim Has Been Dismissed and Does Not Entitle Plaintiffs to a Jury Trial

The Court has entered final judgment dismissing Plaintiffs' CERCLA claim for natural resource damages (Count 2). *See* Dkt. No. 2362 (July 22, 2009). Plaintiffs have put forth no basis to challenge the Court's ruling on this issue,[20] and there is no procedural basis to delay the entry of an order striking the jury demand based on a claim this Court already has dismissed.

But, even if the claim had not been dismissed, Plaintiffs' request for natural resource damages would not entitle Plaintiffs to a jury trial. Contrary to Plaintiffs' claim of settled authority, it appears that the issue of whether CERCLA natural resource damage claims require a jury has yet to be addressed by the Supreme Court, any federal circuit court of appeals, or any district court in the Tenth Circuit. However, courts that have interpreted the law based on analogous circumstances have properly concluded that the recovery of CERCLA natural resource damages is an equitable form of relief. *See, e.g., United States v. Wade*, 653 F. Supp. 11, 13 (E.D. Pa. 1984) (granting motion to strike jury demand because recovery of natural resource damages in the form of funds spent "in assessing any injury to natural resources or rehabilitating or restoring injured resources … would properly be characterized as equitable for the same reasons that recovery of [CERCLA] response costs is considered equitable relief.").[21]

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[20] As detailed in *Defendants' Joint Response in Opposition to Plaintiffs' Motion for Reconsideration of the Court's July 22, 2009 Opinion and Order*, Dkt. No. 2448 (Aug. 10, 2009), Plaintiffs' effort to resuscitate the CERCLA claims lacks merit and should be denied.

[21] Although no circuit court has ruled on this issue, the Second Circuit has indicated its agreement that the right to jury trial does not attach to a natural resource damages claim:

> "[Defendant's] appeal from the district court's ruling "that Congress intended the right to a jury trial in a case where a plaintiff seeks a judgment for money damages for clean-up costs as well as *injury to natural resources* under [§ 9607(a)]," and that "were this not so, this Court would find a Constitutional right to a jury trial," no longer presents a live issue for our resolution. *We caution, however, that the district court's ruling stands alone (so far as we are aware) in opposition to the overwhelming weight of authority on this issue.*

As detailed *supra*, the Supreme Court has characterized an award of money damages as equitable where the relief is "restitutionary" in nature. *Chauffers*, 494 U.S. at 570. In accordance with this ruling, it is universally accepted that the right to a jury trial does not arise in actions for CERCLA response costs because the requested relief is a form of restitution.[22] This same reasoning is applicable to Plaintiffs' natural resource damages claim.

In their motion for reconsideration, Plaintiffs admit that any funds recovered pursuant to their natural resource damages claim "must be used 'only to restore, replace, or acquire the equivalent' of the injured natural resources." Dkt. No. 2392 at 6-7 (quoting 42 U.S.C. § 9607(f)(1) and citing authority).[23] Thus, by definition, the requested recovery is a form of "equitable restitution," as it seeks only to "restore[] to plaintiff, in kind, his lost property or its proceeds." *Crocker v. Piedmont*, 49 F.3d 735, 748 (D.C. 1995); *see Hatco Corp.*, 59 F.3d at 412 ("Restitution is based on substantive liability having its origins in unjust enrichment or the restoration to a party in kind of his lost property or its proceeds."). Because the only form of relief available under Plaintiffs' natural resource damages claim is equitable in nature, a right to jury trial would not be available even if Count 2 were reinstated. *See Wade*, 653 F. Supp. at 13.

CONCLUSION

The remaining issues in this case are matters appropriately tried to the bench, not a jury. Accordingly, the Court should grant Defendants' request to strike Plaintiffs' jury demand.

New York v. Lashins Arcade Co., 91 F.3d 353, 362 n.7 (2d Cir. 1996) (internal citations omitted) (emphasis added) (citing authority).

[22] *See, e.g. Hatco Corp. v. W.R. Grace & Co. Conn.*, 59 F.3d 400, 412 (3d Cir. 1995); *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 749 (8th Cir. 1987); *United States v. Viking Res., Inc.*, 607 F. Supp. 2d 808, 830 (S.D. Tex. 2009) (listing authority). In fact, Plaintiffs' Opposition concedes by omission that Plaintiffs' CERCLA cost recovery action (Count 1) would not present any jury issues. *See* Opp. at 10-11.

[23] By Plaintiffs' own admission, the recovery of any non-restitutionary damages would necessarily implicate the interests of the Cherokee Nation in violation of Rule 19 and this Court's July 22, 2009 Opinion and Order. *See* Dkt. No. 2392 at 6-7, 12-13; Dkt. No. 2362.

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